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IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 161

CLINTON FOODS INC., *Claimant,* and CLINTON FOODS INC., a Corporation, *Petitioner,*

v.

UNITED STATES OF AMERICA

and

HONORABLE BEN MOORE, *Judge,* United States District Court for the Southern District of West Virginia

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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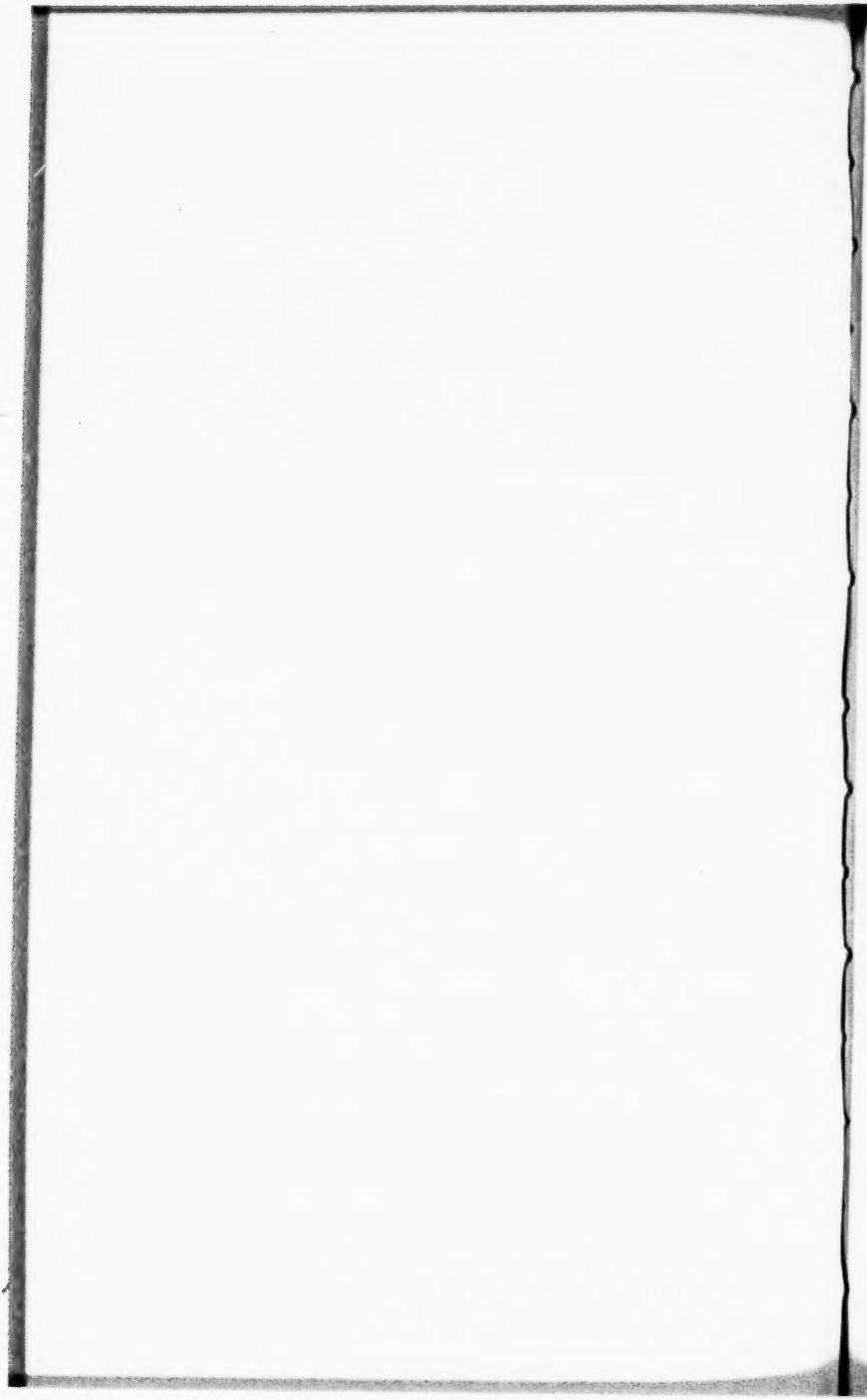

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

PRELIMINARY

The petitioner, Clinton Foods Inc., respectfully represents that it is aggrieved by the decision and final judgment of the United States Court of Appeals for the Fourth Circuit rendered on the 2nd day of April, 1951.

In its decision, in its case No. 6209, the Court of Appeals disposed of an appeal by your petitioner from an order of the United States District Court for the Southern District

of West Virginia and also, in its Case No. 6210, of a petition for a writ of mandamus filed in the Court of Appeals by your petitioner. Both the appeal and the petition for writ of mandamus sought relief from a prior order entered by the District Court in a case brought under the provisions of 21 U. S. C. Sections 334, 342(b)(4) and 353(a), styled *United States of America, Libellant,* v. *630 Cases of Orangeade, Clinton Foods Inc., Claimant.* In its order the District Court denied your petitioner's motion for a change of venue to a more convenient forum, holding that it had no power to grant such a change of venue and refusing to consider the merits of the motion.

Both the appeal and the petition for writ of mandamus involved the same questions and were briefed, heard and disposed of together in the Court of Appeals; therefore, a single Certiorari application is hereby made. Your petitioner prays for the allowance of a writ of Certiorari directed to the Court of Appeals for the Fourth Circuit and that the matters involved be heard together in this Court.

OPINION BELOW

The opinion of the Court of Appeals appears in the record (R. 31-38) and is officially reported in 188 F. 2d 289. The District Court rendered no written opinion. Its order overruling petitioner's motion for a change of venue appears in the record (R. 21a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED

The question presented by this case is whether a libel brought by the United States of America against a food product under the provisions of the Federal Food, Drug

and Cosmetic Act (21 U. S. C. Sec. 301 et seq.), charging both misbranding and economic adulteration, may, on motion of the owner of the libeled product, be transferred to a more convenient forum under the provisions of 21 U. S. C. Section 334(a) and 28 U. S. C. Section 1404(a).

STATUTES INVOLVED

The pertinent provisions of the Federal Food, Drug and Cosmetic Act (21 U. S. C. Sec. 301 et seq.) are as follows:

> "Sec. 334. Seizure—Grounds and Jurisdiction
>
> "(a) *Any article of food,* drug, device, or cosmetic *that is adulterated or misbranded* when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not, under the provisions of section 344 or 355, be introduced into interstate commerce, *shall be liable to be proceeded against* while in interstate commerce, or at any time thereafter, *on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: Provided, however, That no libel for condemnation shall be instituted under this chapter for any alleged misbranding if there is pending in any court a libel for condemnation* proceeding under this chapter *based upon the same alleged misbranding, and not more than one such proceeding shall be instituted* if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this chapter, or (2) when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous

to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. *In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial."**

"(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. When libel for condemnation proceedings under this section, involving the same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction,

*Those portions of this subsection relevant to the controversy at hand have been italicized.

and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby."

"(f) In the case of removal for trial of any case as provided by subsection (a) or (b)—

"(1) The clerk of the court from which removal is made shall promptly transmit to the court in which the case is to be tried all records in the case necessary in order that such court may exercise jurisdiction.

"(2) The court to which such case was removed shall have the powers and be subject to the duties, for purposes of such case, which the court from which removal was made would have had, or to which such court would have been subject, if such case had not been removed."

The pertinent provisions of the Federal Judiciary Act (28 U. S. C.) are as follows:

"Sec. 1291. Final decisions of district courts

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

"Sec. 1345. United States as plaintiff

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

"Sec. 1356. Seizures not within admiralty and maritime jurisdiction

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction."

"Sec. 1395. Fine, penalty or forfeiture

"(b) A civil proceeding for the forfeiture of property may be prosecuted in any district where such property is found."

"Sec. 1404. Change of venue

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

"(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer."

STATEMENT OF THE CASE

The proceedings below were started by the United States of America in the United States District Court for

the Southern District of West Virginia by filing a libel against 630 cases of orangeade located in a warehouse in Charleston, West Virginia, within the Southern District of West Virginia, where they had been brought from Dunedin, Florida. The libel alleges that the seized product is misbranded and adulterated (in the economic sense) in violation of the provisions of the Federal Food, Drug and Cosmetic Act (21 U. S. C. Sec. 301 et seq.) and prays that all persons having an interest in the seized product be cited to appear to answer the libel and that the Court decree condemnation of the product (R. 8a).

Thereafter, on the same day, pursuant to a monition of attachment issued by the District Court to the United States Marshal the 630 cases of orangeade were seized in Charleston, West Virginia. Clinton Foods Inc. intervened as Claimant and filed an original and amended claim and answer. This amended claim and answer, *inter alia*, denied violation of the Federal Food, Drug and Cosmetic Act (R. 12a).

In due course, Clinton Foods Inc. filed its written motion for a change of venue under the provisions of Section 334 of the Food, Drug and Cosmetic Act (21 U. S. C. Sec. 334) and Section 1404(a) of the Judiciary Act (28 U. S. C. 1404(a)) (R. 17a). Clinton Foods Inc. and the Government filed affidavits relating to the convenience of the forum (R. 17a, 19a). The District Court refused to receive or consider any evidence relating to the convenience of the forum and refused to consider Claimants' motion for a change of venue on its merits. The Court based its decision upon the ground that the action, being *in rem*, is not transferable under any statute relating to change of venue (R. 21a).

Your petitioner perfected its appeal to the Court of Appeals for the Fourth Circuit from the order of the District Court refusing to consider, on its merits, its

motion for a change of venue. At the same time it filed its petition for a writ of mandamus against Honorable Ben Moore, Judge of the United States District Court for the Southern District of West Virginia, praying that he be ordered to consider proper evidence relating to the convenience of the forum. The Court of Appeals dismissed the appeal and denied the writ of mandamus (R. 38).

SPECIFICATION OF ERRORS

The Court of Appeals erred:

1. In holding that the order of the District Court overruling your petitioner's motion for a change of venue is not appealable under the provisions of 28 U. S. C. Section 1291;

2. In holding that the libel action is not transferable under the provisions of 21 U. S. C. Section 334(a);

3. In holding that the libel action is not transferable under the provisions of 28 U. S. C. Section 1404(a).

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *COHEN* V. *THE BENEFICIAL INDUSTRIAL LOAN CORPORATION*, 337 U. S. 541 (1949).

In the recent well considered case just cited, this Honorable Court said, in discussing 28 U. S. C. Section 1291:

> "The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. *But the District Court's action upon this application was*

concluded and closed and its decision final in that sense before the appeal was taken.

"Nor does the statute permit appeals, even from duly consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. *But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably.* We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.

"This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, *rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.* The Court has long given this provision of the statute this practical rather than a technical construction. * * *" (Italics added.) 337 U. S. at 546.

So in the instant case the question of change of venue in the interest of economy and convenience will have become moot after final judgment on the merits. At that time the extent of the unnecessary expenses incurred will be determinable, the inconvenience and hardship will have been demonstrated, but nothing can be done about it.*

---

* See *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329, 330 (C. A. 2d 1950), *cert. den.*, —— U. S. ——, 71 S. Ct. 79, 95 L. Ed. Adv. Ops 39 (1950).

The Court of Appeals simply failed to meet the issues posed by the realities of the situation. In an *ipse dixit* fashion it simply held that the *Cohen* case "is clearly not in point" (R. 34). It dismissed your petitioner's effort to procure a hearing upon the merits of the question of hardship necessarily resulting from trial in the forum chosen by the Government with the mere assertion that "there is absent here a 'final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.'" (R. 34). This, we submit, simply begs the question.

II

THE INSTANT PROCEEDINGS PRESENT QUESTIONS OF GREAT PUBLIC INTEREST IN THE INTERPRETATION OF THE FEDERAL FOOD, DRUG AND COSMETIC ACT, 21 U. S. C. SECTION 334, WHICH HAVE NOT HERETOFORE BEEN PASSED UPON BY THIS COURT.

The portions of the Federal Food, Drug and Cosmetic Act upon which we rely are 21 U. S. C. Sections 334(a), (b) and (f). They are, we submit, to be read and considered together. Insofar as they authorize seizure of chattels, in advance of an adjudication of the legal rights of the owners of such chattels, their provisions are in derogation of Common Law and should, we submit, be strictly construed. Insofar as these same sections of the statute deal with the procedure laid down for a determination of the respective rights of the parties, their terms should, *per contra*, be liberally construed in aid of an expeditious, inexpensive and fair determination of the very right of each case.

1. The procedural provisions of Section 334(a) authorize the transfer sought by your petitioner.

Divested of inapplicable parts, this section reads as follows:

"Any article of food * * * that is adulterated or misbranded * * * shall be liable to be proceeded against * * * on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: *Provided, however,* that no libel for condemnation shall be instituted under this chapter for any alleged misbranding if there is pending in any court a libel for condemnation * * * based upon the same alleged misbranding, and not more than one such proceeding shall be instituted * * *. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial." 21 U. S. C. Sec. 334(a).

A careful reading of the above quoted subsection reveals that:

(a) In *any* case where the number of libels for condemnation is limited to one proceeding it can be transferred to a more convenient forum;

(b) Only one libel may be maintained against the same product based upon the same charge of misbranding;

(c) A misbranding case may, therefore, be transferred to a more convenient forum. So also may any other case

brought under the section in which the number of libels permitted is limited to one;

We submit that the foregoing leads to the logical conclusion that,

(d) The seizure provision being in derogation of the Common Law must be strictly construed, therefore, only one seizure may be made on the basis of the same combined charge of misbranding and adulteration;

(e) The number of seizures being so limited by the terms of the act, such a case is transferable.

But the libellant says it has put it beyond the power of the courts to grant such a transfer to a more convenient forum, however meritorious the grounds for transfer, because it has charged in the instant proceedings *both* economic adulteration *and* misbranding.

Conceding, for argument's sake, the right of libellant to join with a charge of misbranding a charge of economic adulteration, why should the joint libel partake, for change-of-venue purposes, solely of the restrictive attributes of the economic adulteration case rather than the more manageable and equitable characteristics of the misbranding case?

The Court of Appeals, devoting but a single sentence to this subject, so held "* * * because adulteration along with misbranding is charged in a single libel" (R. 38), thus again merely begging the question.*

It says that a Government Bureau Chief may, by the mere device of charging *both* economic adulteration and misbranding, choose the forum in a food seizure case,

*The Court of Appeals cites *United States of America* v. *11 Cases, etc., Ido-Pheno-Chon*, 94 F. Supp. 925 (D. Ore. 1950) as stating a "rule". That case, however, merely makes the bald statement that joining a non-transferable adulteration case with a transferable misbranding case makes the joint case non-transferable, without assigning reasons.

however great the inconvenience to the citizen involved, and that the courts are powerless to relieve the situation.

This, in spite of the fact that the statutory criteria of transferability is whether multiple libels will lie in the case in question. As was pointed out at the outset, the *seizure provisions of the Food and Drug Act are in derogation of the Common Law and must be strictly construed.* So construed, the Act does not permit multiple libels for *misbranding and "adulteration"* because the very words of the Act expressly prohibit more than one proceeding for the same alleged misbranding. Therefore, this is a case "where the number of libel for condemnation proceedings is limited as above provided" and is removable under Section 334(a) of the Food and Drug Act.

Every argument, derived from the verbiage of the statute, which can be advanced in the instant case for holding a combined misbranding and economic adulteration case not transferable can and should be applied with redoubled force to prove it transferable. Being remedial, the transfer provisions should be liberally construed in favor of the power of the courts so to handle the question of transferability as to enable them to do justice in the matter as between the parties.

III

THE COURT OF APPEALS HAS REFUSED TO FOLLOW PRECEDENTS ESTABLISHED BY THIS COURT AND OTHER COURTS OF APPEALS AND HAS PLACED AN UNDULY RESTRICTIVE AND ERRONEOUS INTERPRETATION ON SECTION 1404(a) OF THE JUDICIARY ACT.

1. All District Courts, without respect to the territorial limits of their districts, have the power to try cases brought under the Food, Drug and Cosmetic Act.

Congress has conferred jurisdiction on the District Courts to try cases such as the present one without territorial limitation:

> "Except as otherwise provided by act of Congress, the *District Courts* shall have original jurisdiction of all civil actions, suits, or proceedings commenced by the United States, or by an agency or officer thereof expressly authorized to sue by act of Congress." 28 U. S. C. Section 1345. (Italics added.)
>
> "The *District Courts* shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States upon land or upon water not within admiralty and maritime jurisdiction." 28 U. S. C. Section 1356. (Italics added.)

The territorial area over which Congress exercised its legislative power in enacting the Food, Drug and Cosmetic Act was the United States, and it conferred in the above sections jurisdiction on the District Courts to enforce the statute enacted pursuant to this power without any express limitations upon the geographical area in which they are to fulfill this function. The logical conclusion to be reached is that the judicial power thus conferred without limitation is co-terminus in geographical area and coextensive in function with the legislative power exercised. The Food and Drug Act is effective throughout the United States. The power to enforce this Act conferred upon the District Courts by the Judiciary Act is also effective throughout the United States. The only requirement necessary to *jurisdiction* not referred to in the sections of the Judiciary Act set forth above is the obvious one that the article proceeded against must exist within the territorial limits of the United States.

The situation is one in which a Federal Court is enforcing a Federal law pursuant to an unlimited grant of jurisdiction by Congress. The attempt by the District Court and the Court of Appeals to place an artificial geographical limitation upon the jurisdiction thus conferred is not

warranted by the language of the legislation, the practical requirements of the case or the equities of the situation.

In 1912 this Court, holding that the basis of the District Court's jurisdiction over cases decided under the provisions of the Food, Drug and Cosmetic Act of 1906 was conferred by the Judiciary Act and not by the Federal Food, Drug and Cosmetic Act, said:

> "* * * We think this Act (Food and Drug) must be held to have been passed not to confer a new jurisdiction upon the District Court, but in recognition of the jurisdiction already created in seizures upon land and water, * *"
>
> *443 Cans of Frozen Egg Product* v. *United States of America*, 226 U. S. 172, 182 (1912).

The jurisdiction already conferred to which the Court refers was that conferred by the Judiciary Act of 1789 as amended:

> "* * Giving the District Court jurisdiction 'of all civil causes of admiralty and maritime jurisdiction * * * and of all seizures on land and on waters not within admiralty and maritime jurisdiction,' **". 226 U. S. at 181.

The most casual reading of the case last cited and the statute therein set forth shows that Congress intended all District Courts to have jurisdiction "of all seizures on land and on waters not within admiralty and maritime jurisdiction * *". In the same section of the Judiciary Act which contains the language just quoted jurisdiction is conferred upon the District Courts in other types of cases, and limited to "their respective districts." Such a limitation has never and does not now exist with respect to the jurisdiction of the District Courts to try cases involving seizures on land and on waters not within admiralty and maritime jurisdiction. If Congress had intended such a limitation, it would have used the ap-

propriate language "within their respective districts" contained in other portions of the same section of the Judiciary Act where such a limitation was desired.

The Court of Appeals has in the instant case refused to recognize the authority of the case last cited and has imposed by judicial fiat a limitation on the jurisdiction of the District Courts which the Congress obviously declined to impose.

2. Provisions for trial of cases such as this in the District in which the article is seized relate to venue only.

It is true that Section 334(a) of the Food, Drug and Cosmetic Act authorizes trial in the District in which the seizure is made, but this is very clearly a venue provision. Such is the holding of this Court in *443 Cans of Frozen Egg Product* v. *United States of America, supra.*

If this were not true, the present libel would be subject to dismissal on the authority of the case *The Brig Ann,* 9 Cranch 289 (U. S. 1815). The case last cited is authority for the proposition that, in actions *in rem* in which the *res* is jurisdictional, the *res* must be seized prior to filing a libel. Otherwise the case is subject to dismissal.

In a case under the 1906 Pure Food and Drug Act the Government filed a libel against 275 Cases of Tomato Catsup, and then seized the product. The claimant intervened and moved for dismissal on the grounds that the Court had no jurisdiction since the libel was filed prior to seizure of the offending product. The Court of Appeals reversed the District Court which had sustained a demurrer and dismissed the libel stating:

> "The proceeding before us was not in admiralty. The Food and Drug Act merely provides for conformity of all proceedings for confiscation thereunder as near as may be, to the proceedings in admiralty. Previous executive seizure is no part of admiralty proceedings. The language in ques-

tion, to our minds, falls far short of declaring by necessary implication that a condition precedent to jurisdiction in case of forfeitures under the laws relating to import, navigation or trade, viz, and executive seizure, is necessary to jurisdiction over judicial proceedings in confiscation under the Food and Drug Act. *Nor is there anything in the language of the present Judiciary Act which limits jurisdiction over condemnation proceedings in rem to the District where the property has been previously seized.*" (Italics added.)

United States of America v. *George Spraul & Co.*, 185 Fed. 405, 410 (C.C.A. 6th 1911).

It thus becomes apparent that the only limitation on place of trial in cases such as the instant case is the limitation contained in Section 334(a) of the Food, Drug and Cosmetic Act and perhaps that contained in Section 1395(b) of the Judiciary Act, both of which relate to venue.

This Court thus succinctly states the effect of venue statutes:

"* * the locality of a lawsuit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts. * * * Section 51 *'merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election.'* * *" (Italics added.)

Neirbo Co. v. *Bethlehem Shipbuilding Co.*, 308 U. S. 165, 168 (1939).

3. The claimant, having moved for a change of venue, has waived its venue privilege and empowered the court to order the case transferred to any more convenient court having jurisdiction.

Section 1404(a) of the Judiciary Act reads as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."
>
> 28 U. S. C. Sec. 1404(a).

Both trial and appeal courts have in effect held that in the meaning of Section 1404(a) a civil action cannot be "brought" except where there is venue as well as jurisdiction. This is, we submit, an unsympathetic and erroneous interpretation of what was intended to be a remedial act. It is, moreover, an interpretation condemned in advance by this Court:

> "A suit is brought when in law it is commenced, and we see no significance in the fact that in the legislation of Congress on the subject of limitations the word 'commenced' is sometimes used, and at other times the word 'brought'. In this connection the two words evidently mean the same thing, and are used interchangeably."
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> *Goldenberg* v. *Murphy,* 108 U. S. 162, 163 (1883).

See also:

> *United States of America* v. *Northern Finance Corp.,* 16 F. 2d 998 (C.C.A. 2d 1927).
>
> *Isaacks* v. *Jeffers,* 144 F. 2d 26 (C.C.A. 10th 1944).
>
> *Armstrong Cork Co.* v. *Merchants' Refrigerating Co.,* 184 Fed. 199 (C.C.A. 8th 1910).

Rule 3 of the Federal Rules of Civil Procedure provides:

> "A civil action is commenced by filing a complaint with the court."

Clearly, in view of the foregoing, this action "might have been brought" in the District Court for Maryland and, in the absence of an objection to venue by Claimant, there prosecuted to final judgment.

Such is the holding of a recent thoroughly considered decision of the Third Circuit Court of Appeals. In that case, suit was brought in Delaware against numerous defendants, as to some but not all of whom jurisdiction *but not venue* could have been had in Texas. All the defendants moved for transfer to Texas under Section 1404(a). The court held that an action could have been "brought" within the meaning of Section 1404(a) against all the defendants in Texas *even though venue as to some was lacking there.* The court held:

> "Suits embracing the identical subject matter could have been brought and, literally, 'might have been brought', by the plaintiffs against the defendants in any district court in Texas. Moreover, if brought, the suits could have been maintained unless there had been seasonable objection to the venue by the defendants, for service of process under Section 12 of the Clayton Act could have been found. * * *
>
> "By joining in the motion to transfer the defendants have waived any objection to Texas venue and have agreed to submit themselves to a Texas court. Therefore, suits embracing the same parties and the same subject matter could now be brought and maintained in Texas. Indeed they could have been brought in Texas on November 6, 1947 and March 29, 1948, the dates on which the actions were commenced in the District of Delaware, and

> *could have been maintained in Texas if no objection had been timely made to the venue.* The difference between the phrase 'might have been brought' of Section 1404(a) and that employed in this opinion, 'could now be brought', is no more than one of tense and grammar, the imperfect subjunctive as compared to the pluperfect subjunctive. Surely Congress did not intend the effect of an important remedial statute to turn upon tense or a rule of grammar." (Italics added.)
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> *Paramount Pictures, Inc., et al* v. *Rodney,* 186 F. 2d 111, 114 (C. A. 3d 1951), *cert. den.,* 19 Law Week 3258 (1951)

Indeed from the language quoted it will be seen that the court there, under the canons of liberal interpretation, very properly held that the term "brought" may be viewed in retrospect, after the appearance and waiver of venue by defendants as to which there was theretofore no venue and, in the light of such waiver of venue, the word "brought" may in effect mean "might have been brought" or "could now be brought".

In the instant case your petitioner has come in, submitted itself as fully as a claimant can in such a seizure case to the jurisdiction of the district court and has moved for transfer to the District of Maryland. By so doing it waives any objection to venue in Maryland and offers effectively to acknowledge venue there. To argue that whereas this can be done in such a case as *Paramount Pictures, Inc.* v. *Rodney, supra,* but cannot be done in the instant case because of the mere fact that it is a seizure case, is to nullify the remedial purposes inherent in Section 1404(a) by illiberal interpretation.

IV

THERE IS GREAT PUBLIC INTEREST IN THE CLARIFICATION AND AUTHORITATIVE INTERPRETATION OF THE STATUTES INVOLVED.

Section 1404 of the Judiciary Act was enacted with a view to correcting a situation whereby plaintiffs were permitted unbridled control of the forum of litigation without regard to the hardship and inconvenience caused defendants and witnesses. We feel that the purpose of the reform embodied in Section 1404 was to shift this control from the interested plaintiff to a disinterested judge who could, in the exercise of sound judicial discretion, impartially examine the circumstances of the case, consider the convenience of the parties and their witnesses, and then order trial of the case in that forum which seemed to offer the most promise of a convenient, speedy, just and inexpensive determination of the case. Certainly this worthy purpose deserves to be implemented in every way possible, including a liberal interpretation by the courts. This honorable Court has heretofore recognized this obligation. *E. g., Ex parte Collett,* 337 U. S. 55 (1949); *United States of America* v. *National City Lines,* 337 U. S. 78 (1949).

Although Section 1404 is of the greatest importance in a very large percentage of all of the cases decided in the Federal Courts, confusion has arisen because of a lack of uniformity of interpretation by the courts. See Hon. Irving R. Kaufman, *Observations on Transfers Under Section 1404(a) of the New Judicial Code,* 10 F. R. D. 595. This confusion, with its attendant threat of costly delay in litigating a procedural matter prior to trial of the case on its merits, no doubt discourages many litigants from demanding the beneficial rights conferred by Section 1404. We feel that the restrictive interpretations adopted by some of the lower courts have deprived litigants of rights they were intended by Congress to have. Certainly

it is of the utmost importance that this honorable Court correct the situation which has thus arisen by giving an authoritative interpretation of this most important legislation.

Most of what has been said above with regard to Section 1404 of Judiciary Act can be said, with equal validity, about the transfer provisions of Section 334(a) of the Food, Drug and Cosmetic Act. Although this section is obviously applicable to only a specialized type of litigation, the type of litigation to which it is applicable is both important and extensive.* It is common knowledge that Food and Drug cases comprise one of the most time consuming and costly types of litigation. Trials lasting many days and requiring the attendance of many witnesses both lay and expert are common.† For this reason it is of the utmost importance that such cases be tried in the most convenient and economical forum. Our position with regard to the interpretation of Section 334(a) is simply this: Cases involving charges of both misbranding and adulteration are not expressly covered by the transfer terms of the section. A restrictive interpretation leads to the conclusion that the transfer provisions relating to adulteration should apply and render a case involving a combined charge not removable. On the other hand, a liberal interpretation leads to the opposite conclusion. We feel that the remedial nature of the transfer provisions entitle them to this liberal interpretation and that so interpreted they permit transfer of cases involving a combined charge of misbranding and adulteration.

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* In 1950 the Government brought 1,184 seizure cases under the Food and Drug Act against less than 2 percent of 77,350 food, drug, and cosmetic firms subject to regulation under the act. ANNUAL REPORT OF THE FEDERAL SECURITY AGENCY, 1950.

† For example, in *United States of America* v. *88 Cases, etc. "Bireley's Orange Beverage"* No. 10,170 the printed record on appeal to the Court of Appeals for the Third Circuit was 473 pages long. The trial in the District Court was started on October 3, 1949 and concluded on October 27, 1949. That case is now in the process of being tried for a second time.

It is submitted that in view of the foregoing the proper meaning and interpretation of Section 334 of the Federal Food, Drug and Cosmetic Act and Section 1404 of the Judiciary Act are of national importance and concern. They are important not merely to the public officials who are charged with the administration and enforcement of the Food, Drug and Cosmetic Act and the industries which are regulated by this Act but to the public generally. Unless the conflict which exists between the Courts of Appeal of the Third and Fourth Circuits as to the meaning and interpretation of Section 1404 of the Judiciary Act is resolved, the precise scope and meaning of this statute will remain in serious doubt and be productive of continued litigation.

Wherefore it is respectfully submitted that this petition for writ of *certiorari* should be granted.

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